APPEAL NO. 93506

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held on April 30, 1993, in (city), Texas, to decide the following issues: what is the claimant's average weekly wage (AWW); what is the claimant's current weekly wage for calculation of temporary income benefits (TIBS); and whether the sole cause of the claimant's "incapacity" is a subsequent injury occurring on or about (date of injury). At the hearing the parties stipulated that claimant's AWW was $106.47, which is properly based only upon his earnings from UPS. On appeal, the appellant (hereinafter carrier) alleges error in the determination of hearing officer Thurman Williams that claimant's earnings from collateral employment should be excluded from consideration in calculating TIBS while disability continues, and that the claimant did not suffer a new injury on (date of injury). Claimant, as respondent, essentially urges that the hearing officer's determination should be affirmed.

DECISION

Upon review of the record, we affirm the hearing officer's decision and order.

The claimant was working as a loader for (employer) on July 28, 1992, when he injured his right elbow while lifting and loading a box. He was ultimately diagnosed with a fractured elbow and taken off work by (Dr. S). Claimant's job with employer was part time, 2 1/2 to 4 1/2 hours per day, four days a week, and paid $8.50 an hour. (According to the parties' stipulation, his AWW in this job was $106.47.) Claimant concurrently worked full time, eight hours a day, as a security guard for (hereinafter "second job A"). He said the elbow injury did not cause him to miss any time from work as a security guard because that job required him to do paperwork plus to walk rounds at an apartment complex. He earned $10.42 an hour, or $416.00 a week.

The claimant received TIBS from the carrier until December 10, 1992. At that time the carrier cut off TIBS because the claimant's earnings from second job A exceeded his AWW from employer.

On (date of injury), while working at second job A, claimant and another employee detained a person on the premises of the apartment complex. As the other employee went to call the police, the person began running and claimant gave chase. Claimant said he continued to chase the person until he saw a car coming at him, and he jumped on the curb. He denied that he hit or touched the car. That afternoon he said his elbow began hurting, and he called Dr. S the next day but did not see him until November 16th. A February 11, 1993 letter from Dr. S to carrier stated that claimant's "injury of (date of injury), when [claimant] was chasing someone is an aggrevation (sic) of a pre-existing condition. . . . His next visit was November 16, 1992, at that time he had the same symptoms as before, dysesthesia to the right fourth and fifth fingers and painful right shoulder."

The claimant said that carrier's adjuster told him he should contact second job A and let that employer know he had sustained an injury while working for them. The claimant did so, but said he was paid no benefits for the injury. A Form TWCC-21 (Payment of Compensation or Notice of Refused/Disputed Claim) filed by the workers' compensation insurance carrier for the second job A employer does not refuse or dispute the claim, but states under the category of initial payment, "Employee lost less than the waiting period. Not entitled to temporary incombe (sic) benefits."

The claimant said he was terminated from second job A on April 9, 1993. At the time of the hearing he said he was working for a different security company (hereinafter "second job B"), earning approximately $240.00 a week.

I.

WHETHER THE CLAIMANT'S POST-INJURY EARNINGS FROM COLLATERAL EMPLOYMENT SHOULD BE CONSIDERED IN CALCULATING TIBS DUE WHILE DISABILITY CONTINUES.

The hearing officer determined that, inasmuch as the claimant's preinjury wages from collateral employment were excluded in the calculation of his AWW, his earnings from the same employment are also excluded from consideration in calculation of TIBS. In support of its argument to the contrary, the carrier cites the language of Article 8308-4.23(c) that ". . .[TIBS] are payable at the rate of 70% of the difference between the employee's [AWW] and the employee's weekly earnings after the injury. . ." and claims that this language should be construed to mean all weekly earnings, regardless of the source.

The Appeals Panel has previously addressed this issue in Texas Workers' Compensation Commission Appeal No. 93343, decided June 14, 1993. That opinion noted a prior decision of the panel, Texas Workers' Compensation Commission Appeal No. 91059, decided December 6, 1991, which held that the 1989 Act directed computation of AWW based solely upon the wages earned from the employer in whose service the injury was sustained; wages earned in a concurrent employment as of the date of the injury are disregarded for purposes of computing AWW. That opinion went on to say,

> . . .having interpreted the AWW provisions as indicating legislative intent to disregard wage from a concurrent employment, we are not at liberty now to find a contrary intent for purposes of Article 8308-4.23(c). The Government Code directs that construction of statutory intent must be done to effectuate the entire statute, in a manner which presumes a just and reasonable result. . . Absent Commission rules offering guidance on how concurrent wages should be considered, we will interpret the 1989 Act as an integrated whole. We

> conclude that if concurrent wages earned from an employment held on the date of injury are not used to compute AWW, then it would be inconsistent to allow such concurrent wages to be deducted as weekly earnings after an injury under Article 8308-4.23(c) or (d) (footnotes and citation omitted).

Based upon the foregoing, the hearing officer's determination was correct with regard to earnings from collateral employment which existed at the time of the claimant's injury. Appeal No. 93343, *supra*, stated, however, that the opinion contained therein would not preclude some deduction being made for post-injury wages paid by a concurrent employer if the contract of employment changes after the date of injury, such as if the part-time concurrent employment became full-time. A similar situation existed in this case, wherein the concurrent employment (second job A) ceased on April 9, 1993, and was replaced by second job B.

Under those circumstances, we see no reason that the wages from a new employment would not be considered in the calculation of the amount of TIBS due the claimant. *See* Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.4 (Rule 129.4), which provides in part that the carrier shall adjust the weekly amount of TIBS paid to an injured employee as necessary to match the fluctuations in the employee's weekly earnings after the injury. Indeed, the fact that a claimant is earning wages from a job for which he or she is hired subsequent to the injury, may obviate disability and TIBS altogether. The 1989 Act defines "disability" as the inability to obtain and retain employment at wages equivalent to the preinjury wage because of a compensable injury. Article 8308-1.03(16). This panel has held that the concept of disability is not premised on the inability to obtain and retain employment in the type of work the employee was doing when injured. Texas Workers' Compensation Commission Appeal No. 92083, decided April 16, 1992.

We note, however, that claimant's disability was not an issue in this case. Whether and to what extent he had disability after accepting employment at second job B is a question which would have to be addressed in future dispute resolution procedures.

II.

WHETHER CLAIMANT SUFFERED A NEW INJURY ON (DATE OF INJURY), WHILE EMPLOYED BY THE SECOND EMPLOYER.

The hearing officer found that, although the claimant's elbow began to hurt within hours of the November 4th incident, he suffered no new injury and his medical treatment did not significantly change as a consequence of the incident. Accordingly, the hearing officer concluded that the claimant did not suffer a new injury on November 4th, as the incident which occurred on that date was not the sole cause of the claimant's continued incapacity to his elbow. On appeal, the carrier points out claimant's testimony that his elbow began

hurting one or two hours after the chase, continued through the night, and caused him to call Dr. S the next morning. The carrier contends that the claimant suffered a significant trauma on November 4th, as borne out by Dr. S's letter which mentions a painful right shoulder in addition to elbow pain. The carrier also says a new injury is supported by the fact that claimant reported such injury to his employer at second job A and to its workers' compensation carrier.

We believe the evidence in this case supports the hearing officer's determination on this issue. The claimant testified that the pain he experienced after the chase was the same pain that he had had since his initial injury while working for employer. Dr. S's letter also seems to bear this out (". . .[claimant] had the same symptoms as before. . ."). We also note with some irony the fact that claimant notified his second employer about an injury at the suggestion of carrier's adjustor. We believe the hearing officer's decision on this point is supported by the evidence and is not so against the great weight and preponderance of the evidence as to be manifestly unfair and unjust. In re King's Estate, 244 S.W.2d 660 (Tex. 1951).

The decision and order of the hearing officer are affirmed.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Thomas A. Knapp
Appeals Judge